

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

DONNA JELENIC,

Petitioner,

v.

GUILLERMO GARCIA, WARDEN,

Respondent.

No. CV 10-2899 JST (FFM)

ORDER SUMMARILY DISMISSING
PETITION FOR WRIT OF HABEAS
CORPUS FOR LACK OF SUBJECT
MATTER JURISDICTION

On April 13, 2010, petitioner constructively filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition") herein. This Court entered an order on April 21, 2010 requiring respondent to file a response to the Petition. On July 2, 2010, respondent filed a motion to vacate the order requiring a response on the ground that the Petition is a second or successive petition pursuant to 28 U.S.C. § 2244(b) and that, as a consequence, this Court does not have jurisdiction over the Petition. Respondent lodged documents from this Court demonstrating that petitioner filed a prior habeas petition in this Court on May 7, 1991 (Case No. CV 91-2483) directed to the same conviction sustained in Los Angeles County Superior Court as the Petition. On October 6, 1992, Judgment was entered in Case No. CV 91-2483 denying the Petition on the merits and dismissing the action with prejudice.

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1 The Petition now pending is governed by the provisions of the
2 Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. 104-132, 110
3 Stat. 1214) ("the Act") which became effective April 24, 1996. Section 106 of
4 the Act amended 28 U.S.C. § 2244(b) to read, in pertinent part, as follows:

5 "(1) A claim presented in a second or successive habeas corpus
6 application under section 2254 that was presented in a prior
7 application shall be dismissed.

8 (2) A claim presented in a second or successive habeas corpus
9 application under section 2254 that was not presented in a prior
10 application shall be dismissed unless --

11 (A) the applicant shows that the claim relies on a new
12 rule of constitutional law, made retroactive to cases on
13 collateral review by the Supreme Court, that was
14 previously unavailable; or

15 (B)(I) the factual predicate for the claim could not have
16 been discovered previously through the exercise of due
17 diligence; and

18 (ii) the facts underlying the claim, if proven and
19 viewed in light of the evidence as a whole, would be
20 sufficient to establish by clear and convincing evidence
21 that, but for constitutional error, no reasonable
22 factfinder would have found the applicant guilty of the
23 underlying offense.

24 (3)(A) Before a second or successive application permitted by this
25 section is filed in the district court, the applicant shall move in the
26 appropriate court of appeals for an order authorizing the district
27 court to consider the application."

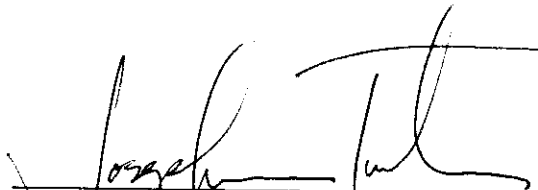
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1 The Petition now pending constitutes a second and/or successive petition
2 challenging the same conviction as petitioner's prior habeas petition in Case No.
3 CV 91-2483, within the meaning of 28 U.S.C. § 2244(b). Because petitioner
4 seeks to pursue claims not contained in the earlier Petition, it was incumbent on
5 her under § 2244(b)(3)(A) to secure an order from the Ninth Circuit authorizing
6 the District Court to consider the Petition, prior to her filing of it in this Court.
7 This requirement applies to a second petition filed after the effective date of this
8 provision even where, as here, the first petition was filed before the effective date.
9 *United States v. Villa-Gonzalez*, 208 F.3d 1160, 1163-64 (9th Cir. 2000).
10 Petitioner's failure to secure such an order from the Ninth Circuit deprives the
11 Court of subject matter jurisdiction.

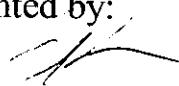
12 For the foregoing reasons, IT IS ORDERED that this action be summarily
13 dismissed, pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the
14 United States District Courts.

15 LET JUDGMENT BE ENTERED ACCORDINGLY.

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17 DATED: 10.29.10

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20 
21 JOSEPHINE STATON TUCKER
United States District Judge

22 Presented by:

23 
24 /S/ FREDERICK F. MUMM
25 FREDERICK F. MUMM
United States Magistrate Judge